IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation, Petitioner,

vs.

JOHN G. PASHEA, Respondent.

No. 641

## PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri

and

## BRIEF IN SUPPORT THEREOF.

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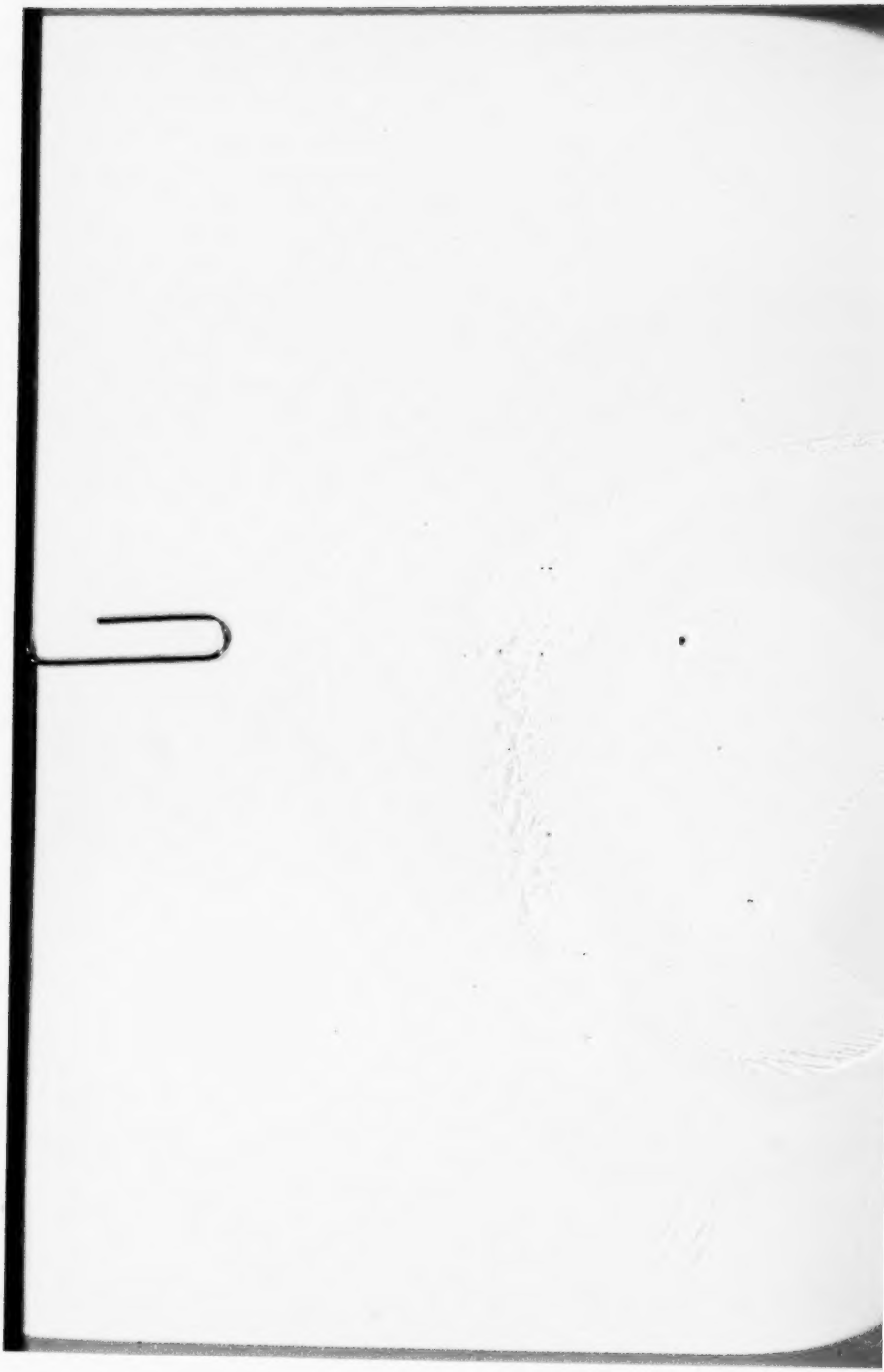

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## PETITION FOR WRIT OF CERTIORARI

**to the Supreme Court of Missouri.**

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Terminal Railroad Association of St. Louis, a corporation, and respectfully petitions this Honorable Court to grant and to issue its writ of certiorari directed to the Supreme Court of Missouri (hereinafter referred to for convenience as the Court below), directing it to send to this Court for review its original opinion rendered October 6, 1942, its opinion denying motions for rehearing and to transfer to court en banc, rendered November 10, 1942, by Division No. 1 thereof, in this cause lately there pending, styled John G. Pashea, Respondent, v. Terminal Railroad Association of St. Louis, a Corporation, Appellant, No. 38,127, on the docket of the Court below, affirming a

judgment of the Circuit Court of the City of St. Louis, Missouri, in said cause, in favor of respondent and against your petitioner herein.

Your petitioner further states that it did not present to the Clerk of the Supreme Court of Missouri, en banc, for filing, a motion in said court en banc to transfer said Cause No. 38,127, from Division No. 1 of said court to said court en banc, for the reason that, had it done so, the clerk of said court would have refused to accept or file said motion in said court en banc, as was done in the case of Julia C. Miller, Administratrix of the Estate of Ernest F. Miller, Deceased, v. Terminal Railroad Association of St. Louis, No. 37,976, on the docket of the Court below, and No. 423 of this Court's October Term, styled Terminal Railroad Association of St. Louis, a Corporation, Petitioner, v. Julia C. Miller, Administratrix of the Estate of Ernest F. Miller, Deceased, Respondent.

## OPINIONS OF THE COURT BELOW.

The opinions of the Court below on the original submission and on motions for a rehearing and to transfer to court en banc in said cause of John G. Pashea, Respondent, v. Terminal Railroad Association of St. Louis, a Corporation, Appellant, numbered 38,127, in the Court below, which are by this petition sought to be reviewed, appear on pages .... to ...., inclusive, of the printed transcript of the record filed herein. Those opinions have not yet been published in the Official Reports of the Supreme Court of Missouri, but will be found in 165 S. W. (2d) 691.

## JURISDICTION OF THIS COURT.

The action here sought to be reviewed, having been brought under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65), the jurisdiction of this Court is based upon Sec-

tion 237 of the Judicial Code, as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 937, Title 28, U. S. C. A., Sec. 344, providing for review in this court by certiorari of decisions of the highest courts of the several states wherein a title, right, privilege or immunity especially set up is claimed under a statute of the United States. Authorities sustaining the jurisdiction are: Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 34 S. Ct. 635, 58 L. ed. 1062; Minneapolis, St. P. & S. S. M. R. Co. v. Goneau, 269 U. S. 406, 46 S. Ct. 129, 70 L. ed. 335; Gulf, M. & N. R. Co. v. Wells, 275 U. S. 455, 48 S. Ct. 151, 72 L. ed. 370; Atlantic Coast Line Co. v. Davis, 279 U. S. 34, 49 S. Ct. 210, 73 L. ed. 601; Steeley v. Kurn et al., 313 U. S. 545, 61 S. Ct. 1087, 85 L. ed. 1512; Seago, Admrx., v. N. Y. Cent. R. Co., 315 U. S. 781; Stewart v. Southern Ry. Co., 315 U. S. 283; Garrett v. Moore-McCormick Company, Inc., et al. (Dec. 14, 1942), U. S. Law Week, Vol. 11, No. 22.

## SUMMARY STATEMENT OF THE MATTER INVOLVED.

This action was commenced and maintained by respondent under the Federal Employers' Liability Act (hereinafter called the Act), 45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65, to recover from petitioner damages for injuries sustained by him while he was acting within the scope of his employment by petitioner as a brakeman on the rear end of one of petitioner's trains. His claim of injury is that when a stop was made at a grade crossing in the State of Illinois, he was knocked over the rear end of the last car of the train.

Respondent pleaded that "as a direct result of the negligence and carelessness of the defendant, the said train was caused to stop with unusual and extraordinary suddenness and jerk, causing the plaintiff to be violently hurled and thrown from said train" (R. 2, 3).

At the time of respondent's injury about 10 or 10:30 p. m., March 12, 1940 (R. 45, 113, 133), he was riding upon the sixty-third and last car of one of petitioner's freight trains (R. 89), which at that time was moving at a speed of eight or ten miles an hour (R. 69) south or east, depending upon which portion of respondent's evidence is accepted. For convenience, we shall assume that the train was moving south (R. 65, 66). At that time it was raining, "spitting" snow, sleeting and foggy, but the temperature was sufficiently above freezing to prevent the formation of ice on the top of the runway of the car (R. 44).

Petitioner's theory is that respondent was not thrown or knocked off the train; but that after or about the time the train stopped he fell off the north end of the rear car while he was attempting to climb down the end ladder of the car. The facts which support this theory are:

(1) He knew a train was following his train, against the approach of which he had to protect the rear end of his train (R. 45, 47).

(2) The night was dark, and there were sleet, rain and snow falling, and melting as they fell. This condition severely reduced visibility and made footing on top of the car precarious (R. 44).

(3) Respondent had no vision in his left eye (R. 90, 91).

(4) After his fall respondent was lying only about five feet from the wheels of the rearmost car of the train, over the end of which he says he was knocked (R. 68, 96), directly between the rails and about in line with the drawbar (R. 68). In falling he apparently "just cleared the coupler" (R. 97). Obviously he was two or three feet closer to the end of the drawbar than he was to the wheels, as the photograph of the car from which respondent fell, marked "Plaintiff's Exhibit F-1," opposite page 58 of the

record, shows that the wheels are about two or three feet from the end of the drawbar.

(5) The rear end of the last car of the train from which respondent fell moved, if at all (R. 74, 97), not more than a foot or two (R. 74).

(6) The impossibility of stopping the train within a foot or two, even at six or eight miles an hour, is manifest.

As forecast in his petition, respondent testified that there was a sudden and extremely violent stop which knocked him eight or ten feet off and over the end of the last car of his train. He described the occurrence as follows:

> "Q. Now, I want you to explain to the Court and the jury, a little more in detail, just what the effect on you was when that stop occurred. What did it do to you? A. Well, a man generally braces, as well as he can brace himself, and it swung me one way.
>
> Q. Was that towards the front? A. Yes, sir.
>
> By Mr. Sheppard: We object to that as leading, your Honor.
>
> By Mr. Cox: Let me finish the question.
>
> By Mr. Sheppard: No; it is putting the answer in the witness' mouth.
>
> By Mr. Cox (Q.): Was that towards the front or rear? A. Towards the front, because you are braced that way, and then the sudden jerk of the train, the sudden stop, it knocked me off the rear end.
>
> Q. And, with reference to any motion, was there any other motion of the car beside front and back? A. It jerked and swung around, and wrestled around" (R. 60, 61).

On cross-examination he testified that he was standing still on the running board on top of the last car in this freight train, at a point about eight or ten feet from the rear end of the car, holding to nothing (R. 65).

While standing in this position, and without hearing any noise of slack running up or brake shoes grinding against wheels (R. 68, 69, 71), and without feeling any jar, he was suddenly knocked eight or ten feet straight north over the end of the car (R. 68, 69). As he expressed it, the first thing he knew he was off (R. 68); just all at once, and away he went (R. 69); just like the snap of your fingers (R. 71).

Immediately preceding his fall there was neither an increase in speed, and then a stop, nor a stop and then an increase in speed; it just stopped (R. 69). The only thing that happened was a sudden stop (R. 69), when it was moving at about eight miles an hour (R. 69).

He stated further that he was thrown eight or ten feet directly over the end of the rear car of the train (R. 67, 71), not over the side or corner of the car (R. 67), but directly over the end. He landed between the rails of the track over which his train was moving (R. 68), with his head about five feet from the wheels of the car (R. 67, 68), and his feet about five feet seven inches (his height) farther north (R. 68).

The train did not move more than a foot or two, if at all, after respondent fell over the end of the car (R. 74).

When asked if he knew the stop was to be made, respondent replied that he did not know exactly what they were going to do; that sometimes "they pull the whole train and sometimes they don't" (R. 78). The engineer said that was a scheduled stop (R. 125).

Respondent's testimony shows further that at the time of his injury he was facing practically the opposite direction from the movement of the train—facing the rear end of the car over which he fell (R. 66). He does not say that the sudden and violent stop threw him in the direction of the train's movement, or sideways, but only directly contrary to the direction the train was moving and over

the rear end of the car upon which he was standing (R. 67, 68, 74).

Respondent testified that there was "some noise" preceding the jar (R. 64). However, immediately before making this statement, respondent had testified that "there was no warning" of the stop; that "the first intimation" he had received was the "jar, and then I was thrown off. That is the first indication that I got" (R. 64). Later he stated again that he had heard no noise and had felt no jar; that he was just knocked right off (R. 68); that he did not hear that noise which is always produced by the taking up of slack; "it was just that quick—just like the snap of your fingers—and I was on the ground" (R. 71). He stated further that ordinarily one hears the slack being taken up when a train of the length of this one stops suddenly—he had heard it a million times—one who works on a "drag" (as was this one) hears the running of slack every hour of every working day (R. 72), but he did not hear it on this occasion; "it was all at once. It just stopped right now" (R. 72).

Petitioner's evidence shows no abnormal stop was made (R. 103, 121); that before making a stop at St. Clair avenue the speed was reduced to four, five or six miles an hour (R. 102, 117, 133); that when the stop was made it was done by automatic rather than straight or engine air (R. 103, 114).

The basis of the decision of the Court below is thus stated in its opinion:

> "When all of plaintiff's testimony is considered together most favorably to his claim (as it must be in ruling the sufficiency of his evidence to make a jury case) there is substantial evidence to show that the first force applied in the stop did operate in the direction defendant says the law of inertia would operate but that plaintiff was not thrown forward by it because he was braced against it. It does not seem

unreasonable to believe that there would be some jerk back or rebound immediately thereafter from such a sudden stop. It is true that plaintiff said it happened quickly (indicating with a snap of his fingers) but only such a sudden stop would likely have caused him to lose his balance. Therefore, we think it would be reasonable for the jury to find that there was in operation more than a single force in one direction only; that there was a sudden jerk, shake, or rebound as well as a sudden slackening; that the forces applied in bringing the train to a sudden stop operated both forward and backward; and that plaintiff would not be thrown down forward when braced against such a force operating in that direction but could, because of the violence of that force and slick condition of his footing, lose his balance so as to be thrown off the end of the car by subsequently acting forces from those movements which he described as 'buckled,' 'twisted,' 'jerked,' 'swung around' and 'wrastled around.' "

## QUESTIONS PRESENTED.

I.

Is respondent's testimony that while riding upon the top of the last car of a train slowly moving south, it suddenly and violently stopped, whereby he was thrown or knocked a distance of eight or ten feet in the opposite direction from the movement of the train, contrary to the law of inertia, and, therefore, nonexistent as a basis for judicial action?

II.

If we assume that respondent's evidence is not contrary to physical law, is it so contradictory as to be self-destructive, leaving his theory without any evidential support?

III.

Is petitioner's evidence of such a conclusive character "that if a verdict were returned" for respondent "it would have to be set aside in the exercise of a sound judicial discretion?"

IV.

May a judgment be affirmed on appeal on the theory that a jury has a right to disregard plaintiff's positive testimony and base its verdict solely upon speculation exactly contrary to his positive evidence? May a plaintiff testify to facts which prevent his recovery, obtain a verdict and have his judgment affirmed upon the theory that although his testimony was insufficient, his judgment will be upheld because the jury had a right to disregard his testimony and find for him upon a speculative theory directly contradicted by his evidence?

The Court below held that although respondent testified time after time that nothing happened except that a violently sudden stop knocked him off the rear end of the train, the judgment would be affirmed on the theory that he was thrown off the car not by the sudden stop (as he stated), but by the rebound from the sudden stop. This rebound theory is nowhere advanced by respondent either in pleading or evidence. With thirty years' experience behind him, it is inconceivable that he would not have so testified if that had been true. Moreover, the sudden stop (the primary shock) must necessarily have been greater than the rebound (the secondary shock). Nevertheless the Court below approved a finding that the primary shock did not knock him down, and the secondary shock knocked him eight or ten feet. In effect, the Court below has held that the rebound of a sledge hammer after striking a piece of iron is greater than the initial blow; that the lesser includes the greater.

## REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I.

Respondent's claim that he was knocked north by the sudden stopping of a southbound train is based upon a physical impossibility. He did not claim he was first thrown towards the south, although he did say (R. 61), in answer to an extremely leading question, that he was "swung" towards the south; but he said on the same page and only eight or nine lines below: "And then the sudden jerk of the train, the sudden stop, it knocked me off the rear end." At numerous other times during his testimony he said that the first intimation of a stop was when he "was thrown off" (R. 64); he heard no noise and felt no jar, but was knocked "right off" (R. 68); the only thing that happened was that it "suddenly stopped" (R. 69); "it was just a sudden stop" (R. 69); "just knocked off. It was just a sudden stop" (R. 69); "it was just that quick (indicating), and I was on the ground. Just like the snap of your fingers" (R. 71).

It is quite true respondent said: "Well, a man generally braces, as well as he can brace himself, and it swung me one way" (R. 61). But as he was facing the rear end of the train he could not stoop forward to "brace" himself against a stopping shock. If he had done so, when the shock came he would have had to run backwards toward the front of the train. Moreover, how could he have "braced" himself when his first knowledge that there was to be a stop was when he was "thrown off" (R. 64)? He heard no noise, felt no jar, but was knocked "right off" (R. 68). He was asked, "What was the first warning of any kind of this sudden stop that you noticed?" He replied: "There was no warning." If he had no warning of any kind, how could he have realized the necessity for "bracing" himself?

Clearly a sudden stop of this freight train must have thrown him towards the head end of the train, by operation of the uniform and immutable law of inertia. That it did so operate admits of no possible doubt. Respondent's story is wholly wrong.

II.

But if we assume his evidence is not violative of the law of inertia, it is so self-contradictory as to destroy its probative value. He says he heard "some noise" before the jar came (R. 64); he heard "no noise" (R. 68, 69). It "swung" him towards the front of the train, and "jerked and swung around, and wrastled around" (R. 61); he heard no noise, felt no jar, "just knocked me right off" (R. 68); the only thing that happened was that it suddenly stopped (R. 69).

III.

Respondent's evidence is not only contrary to physical law and self-contradictory; but even though it were not, petitioner's evidence is so overwhelmingly destructive of respondent's that this judgment cannot stand. This Court as well as all of the inferior federal courts have held for many years that under these circumstances judgment for respondent cannot be upheld. It is not and never has been the law that a jury may capriciously and arbitrarily base its verdict upon wholly insubstantial evidence merely because it favors a plaintiff, and ignore substantial evidence merely because it favors a defendant. No juror under his oath to try a case on the law and the evidence may disregard evidence which is not inherently unworthy of credit or violative of any physical law, and base his verdict upon a plaintiff's uncorroborated evidence which is opposed by the overwhelming evidence of defendant. If he may, then he does not base his verdict upon the evidence, but upon his prejudice.

Petitioner's evidence shows the freight train was handled in the usual manner; that the air brakes were applied by the customary method; that the speed at the time of the stop was no more than four to six or possibly eight miles an hour; that at such speed there can be no suddenly violent stop, regardless of the use of engine rather than automatic air. This evidence is not denied by respondent.

Consequently, respondent's evidence alone that there was such a sudden stop as to throw him eight or ten feet is wholly incredible, and a verdict based upon it is not and cannot be based upon the evidence, because the evidence will support no such verdict. Therefore, such a verdict must have resulted from prejudice against petitioner.

A verdict is either based on the evidence or it is not. If it is based on the evidence, then if the evidence is overwhelmingly favorable to a defendant, and not inherently incredible or impeached, the verdict will unquestionably be for defendant. If the verdict in such a case is for plaintiff, then inevitably it is not based upon the evidence.

IV.

The opinions of the Court below affirming respondent's judgment are based upon speculation, and are directly contrary to respondent's evidence.

He was a switchman of thirty years experience (R. 42); accustomed to riding on the tops of freight trains; familiar with their jerks, jolts and stops, with the noise of brake shoes being applied to wheels and the running up of slack. He claimed to know, and, moreover, testified to, all of the details of the occurrence. He sought a verdict upon his detailed story of the happening.

It is taken to be axiomatic that no plaintiff will be permitted to recover on a theory directly contrary to or unsupported by his evidence. Nevertheless that is what the Court below approved, basing its action wholly upon speculation.

(1) Respondent said repeatedly that nothing occurred except a sudden stop (R. 68, 69, 71, 72). The Court below said: "It does not seem unreasonable to believe that there would be some jerk or rebound immediately thereafter from such a sudden stop." Of course it cannot be denied that, strictly speaking, there would be a rebound of some degree, but to affect this case it would have to be of consequence. Respondent says nothing about a rebound. Who knows better than he whether or not there was a rebound? How does the Court below know there would be a rebound of any consequence following the stopping of a 63-car freight train when traveling at six or eight miles an hour? How does the Court below know how great such a hypothetical rebound will be? Moreover, respondent says nothing about being thrown off the car by a rebound. In addition, the Court below concedes respondent could not have been thrown over the end of the car (as he says) by the stop, and he says positively he was not thrown in the opposite direction by it. Thus the Court below inevitably finds that the primary shock (the stop) was less severe than the secondary or resulting shock (the rebound); that the upward bounce of a sledge hammer is more violent than the downward striking blow.

(2) The Court below says the jury could have found that "there was in operation more than a single force in one direction." The fact that respondent's evidence is directly to the contrary is a sufficient answer to that hypothesis. His positive testimony is that there was no movement of the train except a violently sudden stop.

It will not be denied that, under proper conditions, a suddenly violent stop of a 63-car freight train may set in operation "more than a single force." In other words, there may be a rebound as well as a sudden stop, provided factors other than just the stopping are present. But the error in the reasoning of the Court below lies in the fact that it cannot possibly know, and, therefore, cannot take

judicial notice under the facts which appear in this record, that a sudden stop would have set in operation a force counteracting the law of inertia, viz., the force which produces a rebound, which would be of sufficient strength not only to have counteracted the law of inertia, but to have completely overcome it and thrown him eight or ten feet in exactly the opposite direction.

In other words, the Court below hypothesized that although the sudden stop was sufficient to throw him somewhat to the south (he denies this time after time), but insufficient to make him fall, yet the contrary acting force overcame the law of inertia to the extent that he was knocked a distance of eight or ten feet and off the end of the rear car.

Two reasons negate such a hypothesis: (1) there is no evidence to support it, and (2) as a matter of physical law it is incorrect.

(3) The Court below says further that the evidence warranted the jury in finding:

> "that the forces applied in bringing the train to a sudden stop operated both forward and backward; and that plaintiff would not be thrown down forward when braced against such a force operating in that direction but could, because of the violence of that force and slick condition of his footing, lose his balance so as to be thrown off the end of the car by subsequently acting forces from those movements."

To these hypotheses there are several complete answers:

(a) There is no evidence to support them.

(b) Respondent had no means of "bracing" himself except by reflex muscular action after he felt the shock. The footing was insecure because of the slickness of the runway; there was nothing for him to lean against or hold to; and, moreover, he said repeatedly he had no warning

whatever that a shock was impending and could not have prepared to counteract it.

(c) The rebound could not possibly have been so violent as the primary force resulting from the shock of the alleged violently sudden stop.

(d) The runway was just as slick (but no slicker) when the primary shock of the stop was felt as it was when the hypothetical secondary shock of the rebound was felt.

Of course, it is possible that some of the things hypothesized in the opinion of the court below may have happened. But that they did happen can be no more than speculation, because the evidence of respondent not only fails to prove they happened, but shows they did not happen.

## PRAYER.

Wherefore, petitioner prays that a writ of certiorari be issued by this Court, addressed to the Supreme Court of Missouri, directing that Court to certify to this Court on a day certain to be named therein, a full and complete transcript of the record of the proceedings in said cause of John G. Pashea, respondent, v. Terminal Railroad Association of St. Louis, a corporation, appellant, that Court's number 38,127, to the end that said judgment of said Court may be reviewed by this Court, as provided by law, and that upon such review the judgment of said Supreme Court of Missouri in said cause, dated November 10, 1942, when its motions for rehearing and to transfer to said Court en banc, shall be reversed; and that petitioner shall have such relief as to this Court shall seem appropriate.

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